IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 140 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MIYANA ISMAILBHAI NOORMOHAMMED

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 140 of 2003

MR ASHISH M DAGLI for Petitioner No. 1-7

MS MANISHA L SHAH Ld. APP for Respondent No. 1

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 20/06/2003

ORAL JUDGEMENT

1. This revision application is filed by the ori. accused of Sessions Case No. 39 of 2001 pending before the Ld. Fast Track Court Judge (Ld. Addl. Sessions

Judge), Dhangadhra against an order passed by the said Court on 11.3.2003 rejecting an application of the prosecution exh. 139 under sec. 311 of Code of Criminal Procedure to examine additional witness Sattarbhai Adubhai. The applicants are facing trial for the offence punishable under Section 302 of Indian Penal Code.

2. After the trial was almost over, an application at exh. 139 came to be filed by the prosecution to examine witness Sattarbhai Adubhai alleged to be an eye witness of an incident and not shown as witness in the charge-sheet nor his statement under sec. 161 of CrPC came to be recorded by Investigating Officer.. Application was objected by the defence and after hearing the parties, the trial court came to the conclusion that the witness who is proposed to be examined is son-in-law of deceased and brother-in-law of complainant Mumtazben. In the evidence on record, it is disclosed that the witness might be present at the time of incident. The trial court further observed that only because I.O. has not examined him under sec. 161 of CrPC or not cited as a witness in the charge-sheet, would not establish the fact that the witness might or might not be the eye witness of the incident. The trial court further observed that by summoning witness Sattarbhai Adubhai, no prejudice would cause to the defence.

3. Ld. advocate Mr. Dagli for the petitioner attacked the order impugned on the ground that the application under sec. 311 of CrPC came to be filed at belated stage when trial was almost over and whole evidence was recorded. It was urged that now summoning and examining the witness Sattarbhai Adubhai the great hardship and prejudice is likely to be caused to the accused - present petitioners inasmuch as the defence of the accused in the trial is disclosed. It was further argued that in three line application, the concerned P.P. in-charge of the prosecution, did not mention any reason to justify to exercise the discretion of the court under sec. 311 of CrPC. It was further argued that had the reason been assigned in the application under sec. 311 of CrPC, the defence would have met the same and controverted the reason. It was urged that the defence was deprived of such an opportunity. It was further emphasized that now when the trial is over, to fill up the lacuna in prosecution case, this application is preferred by the prosecution at belated stage which was against the law. Ld. advocate for the petitioners also relied upon the decision of Mysore High Court in the matter of State of Mysore vs. A.G. Ramaswamy, reported in 1969 Cri.L.J. p. 123, the decision of Punjab &

Haryana High Court in the matter of Budh Ram vs. State of Punjab and Others, reported in 1996 Cri. L.J. p. 3356, the decision Madras High Court in the matter of re, N. Krishnaswamy & Ors., reported in 1956 Cr.L.J. P. 583, the decision of the Rajsthan High Court, in the matter of Cheeku Singh vs. State of Rajsthan, reported in 1998(1) Crimes 622 (Raj.) and the decision of Bombay High Court in the matter of B.D. Goel vs. Ebrahim Haji Husen Sanghani & Ors., reported in 2001 Cri.L.J. 450, to substantiate his contention that belated application under sec. 311 of the Code of Criminal Procedure and that too fill up the lacuna in prosecution case must not be entertained.

4. Ld. APP Ms. Shah relying on the scope of sec. 311 of CrPC urged that what is to be seen is interest of justice. She has argued that name of Sattarbhai Adubhai as witness is not unknown to either prosecution or defence. So, many witness have referred Sattarbhai Adubhai to be present at the time of incident and in respect of the trial as envisaged under sec. 311 of CrPC discretion used by the trial court in the interest of justice, may not be up set.

5. To resolve the controversy raised in this revision application, one has to understand the scope of Sec. 311 of the Code of Criminal Procedure and what is meant by lacuna in prosecution case.

6. Examining the scope of sec. 311 of the Code of Criminal Procedure, it clearly transpires that in the shape of this provision, the courts are adequately equipped with aid to prob deep for the search of truth. The courts which are enjoined pious duty to find out truth and render just decision are enabled by this provision to exercise free discretion at any stage of enquiry, trial or other proceedings to summon any person as witness or examine any persoon in attendance though not summoned as witness or re-call or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. When a court of law finds that such an exercise is necessary for just decision of a case, it becomes the duty of the court to summon such witnesses who would not otherwise be brought before the Court. The Courts are empowered to exercise these powers suo motu. Therefore, the provision confers wide discretion on the Court sto act as the exigencies of justice require.

7. A lacuna in prosecution is not to be equated with the fall out of an oversight committed by a public

prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are proned. The Apex Court in the matter of Rajendra Prasad vs. Narcotic Cell, through its Officer-in-Chaerge, Delhi, as reported in AIR 1999 SC 2292 in this respect observed as under in para- 6 and 7:

"6. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act by saying that the court could not 'fill the lacuna in the prosecution case.' A lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are proned. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a Court cannot fill up.

7. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting, errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

8. Therefore, the argument that the application is filed to fill up lacuna in prosecution case is misconceived. There is no inherent weakness in prosecution case which is sought to be corrected by

application to examine the witness. It is pertinent to note that PW-9 Exh. 103 Sharifaben Ayub, PW-11 Exh. 107 Mulbanu Ayubbhai, PW-12 Exh. 109 Muniben Ayubbhai have in categorical terms deposed before the court that Sattarbhai was present when the incident occurred. Failure to record the statement by the Investigating Officer of this witness must not impede the course of justice. It is now settled law that accused must not be profited by the defects of the Investigating Agency and, therefore that must be the reason for the Legislatures to incorporate beneficial legislation like sec. 311 of CrPC. So, in the present case, the application cannot be said to have been filed to fill up the lacuna or gap in the prosecution case as decided by the Apex Court in the above decision of Rajendra Prasad (supra).

9. So far as the stage is concerned, what is material is the discretion of the court to come to the conclusion whether certain evidence is necessary to arrive at just decision. In this case, the trial court has given ample reason for summoning a witness who clearly appears to be a person having knowledge and can depose before the court to assist in arriving at just decision by the Court. This is only important criteria which is required to be taken into consideration under sec. 311 of CrPC viz.a.viz stage of the trial. Therefore, the phrase "at any stage" has gained ground and included in the provision. Only because the defence is disclosed no prejudice may be said to have been caused to the accused on summoning witness Sattarbhai Adubhai. The defence shall not be deprived of right to cross-examine such witness and test the veracity. So far as the stage is concerned, in above mentioned decision of Rajendra Prasad (supra), the Supreme Court observed in para-11 as under:-

> "11. We cannot therefore accept the contention of the appellant as a legal proposition that the Court cannot exercise power of re-summoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered laches only when the defence highlighted them during final arguments. The power of the Court is plenary to summon or even recall any witness at any stage of the case if the Court considers it necessary for a just decision. The steps which the trial court permitted in this case for re-summoning certain witnesses cannot therefore be spurned down nor frowned at."

10. Further, if we consider the facts by different angle, the principle of fair trial not only applies to the defence or accused but the same applies to prosecution as well. Under sec. 311 of CrPC as established by the Apex Court, the power of the court is plenary in summoning the witness, more particularly in this case Sattarbhai appears crystally clear on scenario as a witness. Non-examination by the I.O. of such witness is a defect of the Investigating Agency for which prosecution must not suffer. Refusing to exercise discretion in favour of prosecution would not be only de hors the provisions of sec. 311, but the same would also amount to denial of fair trial to the prosecusion. Whether witness Sattarbhai was actually eye witness or not or his credibility etc., will be judged by the trial court while appreciating his evidence, but undoubtedly summoning him as a witness is necessary for just decision.

11. True, it is that any move made to any court must be disciplined move and this is a universally recognised protocol followed by all concerned since centuries in our judicial system. The application at exh. 139 which P.P. in-charge of the trial filed before the trial court, though may not be so in fact, but certainly gives an impression of perfunctorily submitted. Motions to the court must be reasoned. P.P. is an important component in justice delivering system. Hope emanates from this court to the concerned authorities to bring it to the concerned P.P. to be careful in prime duty of dispensation of justice. More detailed application could have been given which is a protocol discipline for the whole system. Though in the particular case not assigning detailed reasons in the application for summoning the witness would not materially affect result of the case as it appears from the order impugned that reasons were on record of the case and the ld. trial judge considered the same. Further the court may exercise suo motu powers in such circumstances.

12. In this view of the matter, the decision cited by ld. advocate for the applicant would not be helpful to the defence. In the result, for the foregoing reason, this application stands rejected. Notice discharged.

(J.R. VORA, J.)

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